Supreme Court, U.S.
FILED

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Case No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1994

JANET HAUCK WARD

Petitioner,

vs.

CITIBANK, N.A. and MICHAEL J. KIELY, JR.,
as Executors of the Estate of JANET C. HAUCK deceased
and
SOLOMON R. GUGGENHEIM FOUNDATION

Respondents,

On Petition For Writ Of Certiorari
To The Court of Appeals of The State of New York

PETITION FOR A WRIT OF CERTIORARI

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59 pp

INTRODUCTORY STATEMENT

This Honorable Court is requested to review the ad hoc denial of due process by the de facto consolidation of two Appeals by a State Appellate Court without notice and in violation of its Court Rules; and the failure of that Appellate Court and the Court of Appeals, charged with its supervision, to take any remedial action when properly confronted with this denial of due process.

QUESTIONS PRESENTED FOR REVIEW

I. Whether the guarantee of due process of law applies to the State Appellate Courts of the State of New York, who in violation of their own rules de facto consolidate two separate Appeals without notice?

II. Whether U.S. Constitution allows State Appellate Courts to act with total disregard of their own Rules and procedures?

III. Whether a State Court may deny due process of law by procedures which allow them to act without comment and/or opinion when a federal issue has been properly joined?

IV. Whether the failure of the Court of Appeals of the State of New York to supervise the Appellate Division is a violation of due process under the V & XIV Amendments of the United States Constitution?

V. Whether under the circumstances of no notice of consolidation and the use of evidence from the "companion" case as to the deciding fact, does "due deliberation" satisfy the Constitutional guarantee of due process of law and/or equal protection of the law?

PARTIES TO THE PETITION

JANET HAUCK WARD, Petitioner
Daughter of JANET C. HAUCK, Deceased

MICHAEL J. KIELY, JR., Respondent Co-Executor of Estate of Janet C. Hauck, Deceased

CITIBANK, N.A., RespondentCo-Executor of Estate of Janet C. Hauck, Deceased

SOLOMON R. GUGGENHEIM FOUNDATION, Respondent
Legatee under the Will of Janet C. Hauck, Deceased

The Respondents are represented by:

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Note: There are no cases cited in the petition. The following cases are mentioned in the Appendix both in motions and decisions.

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Respondents,

PETITION FOR A WRIT OF CERTIORARI

DEAN LYNCH ESQ.
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OPINIONS BELOW

Application of Citibank, n.a. and
MICHAEL J. KIELY, JR. as Executors
of the Estate of

JANET C. HAUCK
deceased

To Discover Personal Property
Withheld and Belonging to Decedent
608 N.Y.S. 2d 800 (1994)

Proceedings by JANET HAUCK WARD
to Compel Delivery to Her of
Specific Personal Property
Claimed to be Withheld by the
Executors of the Estate of
JANET C. HAUCK, Deceased
200 A.D. 2d 425, 608 N.Y.S. 2d 799 (1994)

JURISDICTION

As to the APPEAL taken by Janet Hauck Ward, Petitioner, as to the Decree of the Surrogate Eve Preminger entered January 12, 1993 as to the Decision of December 17, 1992 resulting in the unanimous affirmance by the Appellate Division, First Department decision No. 50507 entered 1/11/94 Appendix "C" in the first above captioned matter; and, (Hereafter-CITIBANK) AND

As to the APPEAL taken by Janet Hauck Ward, Petitioner as to the Order of Surrogate Eve Preminger entered July 8, 1993 resulting the unanimous affirmance by the Appellate Division, First Department decision No. 50508 entered 1/11/94 Appendix "D" in the second above captioned matter; and, (Hereafter-JANET HAUCK WARD)

Each matter was the subject of an individual Motion for Reargument and/or Leave to Appeal to the Court of Appeals of the state of New York.

Both Motions were deined by a single order dated 3-17-95 Appendix "B" with no opinion as to the consolidation and its denial of due process of law. Petitioner filed a Motin for Leave to Appeal to the Cort of Appeals of the State of New York which was denied without opinion on 9-22-94. Appendix "A".

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1257, as well as the United States Supreme Court's supervisory function.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. AMEND. V: No person shall be held to answer for a capital, nor be deprived of life, liberty, or property, without due process of law;...

U.S. Const. Amend. XIV: No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the law.

NEW YORK CIVIL PRAC. L&R (CPLR) Sec. 602. Consolidation

(a) Generally. When actions involving a common question of law or fact are pending before a court, the court, upon motion may order a joint trial of any or all the matters in issue, may order the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

STATEMENT OF THE CASE

Janet C. Hauck, decedent, and Alicia Patterson Guggenheim were girlhood friends. During decedents marriage to Fred Hauck she had one child, Petitioner — JANET HAUCK WARD, for whom Alicia Patterson was her Godmother. Subsequently, Alicia Patterson married Harry Guggenheim which brought the Haucks in contact with the museum.

Decedent's husband, who predeceased her in the early sixties, was an artist and student of abstract expressionism. His work brought the Haucks in contact with several noted artists of that genre. During their marriage they acquired works by many of those artists, including two paintings by their close personal friend Jackson Pollock which they bought to support and publicize him and his work.

On March 23, 1979 decedent executed her will under which she left the museum "in loving memory of Alicia Patterson Guggenheim and Fred Hauck" thirteen paintings, including the one of disputed Pollock paintings, other significant works of art of other artists friends of the period and several works by her husband. Petitioner, decedent's daughter, was the beneficiary of decedent's other painting by Pollock and three paintings by a different artist. Decedent then made several other preresiduary bequests and disposed of the balance in trust for the benefit of her daughter.

After the will was executed in 1979, decedent asked the draftsman, who is one of the executors, to notify the museum of its prospective bequest. An official of the museum responded to his letter by requesting an itemization of the paintings, which was provided. There was no other contact between the museum and Mrs. Hauck after 1979. The draftsman, Michael J. Kiely, Jr. one of the Co-Executors, testified that decedent never informed him of any change in the bequest to the museum, and also testified there were no discussions of the Will or gifts at all after 1979, inspite of the fact they met each year to do decedent's taxes.
(NOTE: In an Affidavit in support of the Executors' Motion to Dismiss Objections currently pending, Mr. Kiely now represents that decedent gave her daughter a gift of $20,000.00 for her support almost ever year.)

Between 1979 and 1988 the assets which decedent had envisioned would fund the trust for her daughter and grandaughter, including 25 acres of land in New Jersey, were either sold or otherwise depleted.

Petitioner stated in the evidence considered by the Surrogate that her mother expressed her desire to give her both Pollocks starting in the early 1980s. During these conversations between them when decedent told Petitioner to take the paintings home, Petitioner asserted that she did not

take physical possession of the Pollock paintings because she wanted her mother to continue to enjoy them.

Supporting evidence of decedent's intent to make a gift of the Pollock in question to her daughter and the change in her intent to will said painting to the Guggenheim, starting in 1983 or 1984 was offered by the president of Salander-O'Reilly Galleries, Inc., who had appraised decedent's art work. He states that on several occasions he expressed a desire to purchase the Pollock Painting and Decedent would answer "more or less that she had no interest in a sale and anyway (he) would have to talk to her daughter after she died . . ."

During the summer of 1989, while in East Hampton for the summer, Decedent repeated her desire that her daughter have and take physical possession of the two Pollock paintings, and requested that her daughter pick them up from decedent's New York City apartment. Her daughter accepted her mother's gift, but did not take physical posession, but in effect gave a life estate to her mother due to her desire that her mother continue to enjoy them.

In the spring of 1991, decedent removed the Pollock paintings from her apartment in New York City to her home in East Hampton. In May, 1991, decedent called Petitioner and insisted that she "physically take (the paintings)" to her home in Montauk. Petitioner stated that "(this) was very important to her.(mother) And decedent said that she hoped that I (Petitioner) would enjoy them as much as she and my father had". Petitioner then went to decedent's home in East Hampton accompanied by a friend, Paul Scott, where she took physical possession of the two Pollocks. While there Petitioner's friend, Paul Scott saw decedent hand the paintings to Petitioner. Paul Scott did overhear their conversation in which decedent expressed to her daughter that she (mother) insisted her daughter finally take them wishing she enjoy them as much as her mother and father had. At the insistence of her mother, Petitioner in effect terminated the life estate she had granted in 1989.

On June 16, 1991, decedent was suddenly and unexpectedly hospital-

ized. While decedent was in the hospital she asked Petitioner to remove from the East Hampton house a painting by Franz Kline for safe keeping, because she was concerned about it remaining in an empty house. Decedent never returned home from the hospital where she died on June 27, 1991.

In July, 1991, Petitioner received a copy of the 1979 Will from the executors and immediately upon review of same discovered errors in that many of the items mentioned had been given away or lost and in addition she advised that the two Pollocks had been given to her years before and she was in possession of the Kline left to the Guggenheim for safekeeping. This conversation was acknowledged by the executor, Michael J. Kiely, Jr., Esq. in his letter of July 7, 1991 with which he forwarded the Waiver and Consent setting forth Petitioner's position.

Having received no instructions from the executors as to the Kline, on September 16, 1991, Petitioner brought both her Pollock paintings and the Franz Kline to the Salander-O'Reilly Galleries,Inc. for safekeeping, because she would spending the winter in Florida. On September 17, 1991, the 1979 Will was probated.

On April 2, 1992, Executors commenced a proceeding (CITIBANK) for discovery and turnover of the Jackson Pollock-1950 painting in the possession of Petitioner on the date of death of decedent and which by the 1979 Will was left to the Guggenheim Museum. Petitioner answered alleging that the Pollock-1950 painting in question therein as well as the Pollock-1948 devised under the Will were given to her as a gift.

On December 17, 1992 the Surrogate published her Decision. [Appendix "F"] Matter of Hauck, NYLJ, Dec. 23, 1992,@ 23,col 2.

On February 8, 1993 the Notice of Appeal was filed. The Pre-Argument Statement therein Set forth, at items #6,7 & 8, the mistaken position that both Jackson Pollock paintings were tied to the Decision.

No Cross-Appeal was filed.

On April 15, 1993, Appellant's counsel attempted to stay the sale at Christie's scheduled for May 4, 1993, by appearing at the Appellate Division-First Department. At that time Executor's counsel pointed up to the Law Assistant that the Decree did not involve the 1948 Pollock, but only the 1950 Pollock. In light of same the Appellate Court having no jurisdiction, the matter was not entertained.

On April 19, 1993, in accord with the suggestion of the Appellate Court, Appellant's counsel requested that the Executors consent to the resettling of the Decree. Counsel for the Executors replied in the negative.

On April 21, 1993, the Petition of Appellant (Second action-JANET HAUCK WARD) was filed together with a request for an Order to Show Cause. The Petition requested that the Executors turnover the 1950 Pollock that had been obtained by false pretenses. The matter was presented to Surrogate Renee R. Roth, who issued an Order to Show Cause returnable April 27, 1993.

On April 27, 1993, at the return, Surrogate Preminger presiding, Appellant's counsel expressed his surprise, and pointed up that the earlier matter was on Appeal. After assurances by Surrogate Preminger that the earlier case would not prejudice the present matter, and pointing up the reasoning of the earlier Decision appeared to favor the gift of the 1948 Pollock,[46] no request was made for Surrogate Preminger to step aside.

On April 29, 1993, the Surrogate denied the Motion to Dismiss and ordered a hearing on the matter.

On May 24, 1993, the Order was entered setting the hearing for June 24, 1993.

On June 18, 1993, the parties were orally advised that the hearing was to be moved up to June 23, 1993.

On June 23, 1993, the matter was heard, and the Motion to Dismiss granted. Appendix "E-1"

On July 1, 1993, Notice of Appeal was filed.

On July 8, 1993, the Order appealed from was entered. Appendix "E-2"

No Cross-Appeal was filed.

On Septmber 7, 1993 separate briefs were filed and filing fees paid on each matter perfecting both Appeals.

On November 19, 1993, each Appeal was argued separately.

On January 11, 1994, the unanimous Decisions of the Appellate Division First Department affirmed the Decree of January 12, 1993 (No.50507-CITIBANK Appendix "C") and the Order of July 8, 1993 (No.50508-JANET HAUCK WARD Appendix "D"), and noted in each opinion " This appeal and a companion appeal..." FIRST NOTICE TO THE PARTIES.

On February 7, 1994, as to each Decision a Notice of Motion, copies attached and incorporated herein [Appendix "G" (A22-27)], were filed for reargument and in the alternative leave to appeal. Said Notices of Motion set forth the issue of improper consolidation as a denial of due process, as well as reference to the other issues raised by the questions set forth above which were raised as to plain errors set forth in the Appellate Court's decisions.

On March 17, 1994, the Appellate Division First Department by a single order denied both motions. Appendix "B"

On June 17, 1994, Notice of Motion for Leave was filed with the Court of Appeals of the State of New York Appendix "G".

On September 22, 1994, the Court of Appeals denied the Motion without opinion. Appendix "A"

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

The Constitutional guarantee of due process of law was raised to the Appellate Division, First Department in the Motion for Reagrument/Leave to Appeal, when the improper consolidation was made known by the review of each of the Decisions. The Appellate Division, First Department denied the Motions by single Order without addressing the issue of consolidation and due process of law. The issue was again raised to the Court of Appeals by Motion for Leave to Appeal, and again was not addressed. The Motion was denied without opinion or comment except: "due deliberation having been thereupon had,". Notice of Motion for Leave to Appeal appears as Appendix and is incorporated by reference and made a part hereof.

REASONS FOR GRANTING WRIT

I.

The special, important and ultimate reason the within petition for a writ of certiorari should be granted is that the administration of Justice, as illustrated by the matter for which review is requested, demonstrates a clear violation of due process of law, or worse. Nothing can be more important to society or the individuals of that society than living under the protection of due process of law. Without this protection, living is the ultimate cruel and unusual punishment — where might is right and the great god money chooses "charitable" institutions over the love of a parent and child. When the Courts apply the law there will be errors through mistake or otherwise and that is understandable. However, when the plain error is pointed up to the Court, including the allegation and proof that the Court violated its own rules, the failure to explain, let alone act, demonstrates that the individuals subject to those Courts are powerless, and even the best intentions of the dead are their victims. Petitioner is the loving daughter who has first lost her mother, then lost the legacy all, including the Executors, agree her mother intended her to have, because of a lie. Memorandum submitted by the Special Counsel to the GUGGENHEIM states: "....Paul Scott, when asked whether he overheard this alleged conversation in which the decedent made the purported gift, testified to having

heard none: 'I didn't' was his response. Deposition of Paul Scott ("Scott Dep.") CITIBANK.

Having combined the two cases the Appellate Court knows the truth. The testimony of Mr. Scott JANET HAUCK WARD includes as direct words "the decedent used":

Q. Do you recall what Mrs. Hauck said?

A. Yes. She said that she'd gone through a great deal of trouble to get the paintings out to East Hampton and she was rather insistent that Jennie take them finally, as she had tried toget her to take them many times before.(1)

A lie so clear if both matters are viewed together any court is forced to admit due process of law can not be served by the denial of the Truth. This failure of the review courts in the State of New York on two levels demonstrates a failure which must be addressed, or the safeguard of due process is dead in the Empire State. (CITIBANK/Preminger/12-17-92: "While there respondent's friend saw decedent hand over the paintings to respondent. He did not hear their conversation", and referring to the same conversation in the second matter when only the friend did testified; JANET HAUCK WARD/Preminger/6-23-93: "..the conversation is actually the only testimony...")

The Appellate Division "upon reading...and due deliberation having been had thereon" of Appendix G?? denied the request to reagrue or in the alternative leave to appeal without addressing the consolidation or its relationship to the other issues raise. The Court of Appeal "upon due deliberation having thereupon had " of Appendix "G", was equally unimpressed. The New York State Courts had reviewed those materials and come to the conclusion that due process has been followed and Justice served. The United States Supreme Court is requested to review this same materials and under its supervisory function and protect the Constitutional rights of the citizens of the State of New York to due process of law.

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(1)Query: If the court had used Mr. Scotts testimony from the second case to correct the outcome in the first without consolidation or notice, would it be the respondents who would claim a denial of due process?

Petitioner can only conclude that either consolidation without notice, and the other issues of injustice raised merited no comment in the face of the claimed denial due process of law, or in the State of New York's "due deliberation" engenders a process which overlooks such issues in the pursuit of judicial economy. Perhaps it is not proper for me to comment on the Courts of the State of New York in that I am not a member of that bar. However, as a citizen of New York State and in light of my experience with the within matters and the crime amd human suffering I am confronted with everyday I am forced not to dismiss the comments of Ron Kuby, Esq. in "Vanity Fair Magazine". (Jan. 1995)

The Courts of the State of New York are not doing their job. As can clearly be seen the trial court erred in the first matter, CITIBANK, then in the second matter, JANET HAUCK WARD, when confronted with the evidence of that error, the trial court confirmed the greatest of fears, that the Court can fall victim to pride & prejudice. The Appellate Division, for reasons which are beyond this "naive and ignorant"** Petitioner and her counsel, confirmed this travesty, and in doing so breached almost every principle of judical review, and violated Petitioner's right to due process of law. When that Appellate Court was asked to correct this violation by the opportunity to reagrue with knowledge of the "companion" or "consolidation" status it responsed by a single Order which "...denied in their entirety with $100 costs each." The Court of Appeals after "due deliberation" can find no reason, including justice, to inquire why a mother would by a 1979 Will leave her only child her most valued personal possession, a 1948 Jackson Pollock painting and a trust for her support, and upon her death in 1991, have her daughter receive NO JACKSON POLLOCK painting or TRUST for her support. Could the fact that a "charitable" institution represented by a prominant member of the club have influenced the reasoning that a mother would lack "donative intent" to make a gift inspite of delivery and acceptence.

Petitioner asks this Honorable Court by granting the requested writ of certiorari to inquire: What is "due deliberation", and does it satisfy the

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**Characterizations by Executors' counsel

constitutional guarantees of due procees of law and the equal protection of the laws?

II

Petitioner requests that the United States Supreme Court grant a Writ of Certiorari directed to the Court of Appeals of the State of New York to examine that Court's denial without opinion of Petitioner's request that said highest Court of the State of New York review the ad hoc denial of due process and Justice by the unconstitutional de facto consolidation of two separate Appeals in the Supreme Court, Appellate Division, First Department. It is the position of the Petitioner that the failure to act by the Court of Appeals of the State of New York by even rendering an opinion in the face of such a clear denial of due process in violation of the V & XIV Amendments of the U.S. Constitution and absolute violation of it's own Court rule, CPLR 602, demands this Honorable Court to exercise its authority. The public importance of the issues raised within these REASONS FOR GRANTING WRIT strike at the heart of jurisprudence. In a time when the respect for the Law is at a low ebb, we must stop and ask why? It is the position of Petitioner, that no part of society is exempt from cynicism, including the Courts. With all due respect, is there anyone who can deny how overwhelmed the Courts are by the the sheer volume of litigation, set in motion not to pursue Justice,but merely to generate legal fees? Therefore, why should we be surprised that the Court of Appeals of the State of New York when requested to review the plain error of the lower Court, after "due deliberation having been thereon had", denied Petitioner's pursuit of Justice without even getting the caption correct on the Order.

The "Current Affair" analogy for Petitioner's complaint, which illustrates the key constitutional legal issue of the within Petition is as follows:

If in the State of California v. O.J. Simpson, Judge Ito does not allow the 911 tapes into evidence, and Mr. Simpson is convicted. Then upon poling of the jury, a juror states "Guilty, it was a lock after the 911 tape." And upon Appeal therein, the California Supreme Court denied review, after it was pointed up to that Honorable Court the conviction was based

on facts not in evidence and same violated on due process.

Would this Honorable Court issue a Writ, when asked to review: Whether due process of allows a court to base its determination on facts not in evidence?

Coast to Coast the Constitution demands only one answer. Due process requires that the decision of any Court be based upon admitted evidence and not speculation or information not properly before the Court. To demand less of our Courts or ourselves is to tip the scales of Justice and make a mockery of the U.S. Constitution. The answer should be the same: Petition for Writ of Certiorari -- Granted. that situation and the within Petition.

III

Each of us come to the table with certain prejudices. Mine are the result of my upbring, education, experience and other countless accidents, interactions and good and bad luck from birth until today. On top of those immediate inputs and accidents there are the generations of same that made my parents who they were, and determined the where, when, how etc.of my initial starting point. Granted there were major events, discovery of America, World War II, as well as modern dangers, as simple as who you slept with ten years ago or what flight you took, that could have changed or ended your life. Be that as it may, each of us have a different life experience. As a result we each will have unique insights/oversights as to the material just presented. My own prejudice has been discribed to me as a naive "Frank Capra" view of how things should be. Good overcomes evil, the true things of value, outside of eachother, can not be held in our hands. Prehaps my father is to blame, who fought in WWII, and believed the same things? Or, my great grandfathers who fled the poverty, hunger and hopelessness of Europe to America and its promised freedom, "We hold these truths self-evident that all men are created equal....." The sum of my experience tells me this was and remains a lie. It took almost a hundred years, to say Blacks were men, and still the prejudice is self-evident. Is it any less true as to due process of law? What was presented to the New

York Court of Appeals is reproduce as Appendex "G". It is the position of Petitioner, and the fear of her attorney, that said Notice of Motion for Leave to Appeal was never read let alone "due deliberation having been thereupon had" by any Judge of that Honorable Court. The questions raised therein are so basis to the orderly administration of justice, that it is difficult, if not impossible, to believe anyone would not recognize the plain error of the Appellate Division, first in its two decisions and then in the Consolidated denial in one order without opinion, particularly when the Federal issue was raised for the first time in that Appellate motion for Reagrument/Leave to appeal. Is "due deliberation" a code phrase, disclaimer or an obituary for due process of law? "...just two lines in the New York Times..."

IV

The Counsel for the Executors have summed up the entire course of this litigation, which covers three years and two Appeals as the result of Petitioner's "inability to understand that the Executors represent the Estate of Janet C. Hauck, not Objectant(Petitioner), and that they are bound to carry out the wishes of the decedent as expressed in her Will".

Petitioner's "inability " as well as my own comes from the facts of the situation as well as the Will itself. The Executors have admitted, "Moreover, there isn't any doubt that she intended the daughter to have the Painting. It's in the Will". The facts of the situation are as follows: Mr. Kiely, one of the Exeutors, draws the Will in 1979 intending her daughter to receive the 1948 Jackson Pollock and a trust. Mr. Kiely does Mrs. Hauck's taxes each year and is her tax adviser, but never dicusses the Will or gifts again. Mrs. Hauck dies in 1991 and the there is no trust for the daughter and the 1948 Jackson Pollock must be sold for taxes. The Guggenheim Museum, with the aid of the Executors' counsel, Mr. Kiely's firm, defeats a valid gift with the sword of a lie, in the face of delivery and acceptance, by convincing the Surrogate that this mother, who had the above intent, lacked "donative intent" to make such a gift to her only child. How have the Executors carried out the wishes of Mrs. Hauck?

It appears that after "due deliberation" and with full consideration as

to "due process of law" the Appellate Division and the Court of Appeals of the State of New York agree it was "Mrs. Hauck's wishes" that her only child not have the 1948 Jackson Pollock.

If Mr. Kiely, having been her attorney & tax adviser, wished to carry out Mrs. Hauck's instructions and intent as "expressed in her Will", he had only to do his job after 1979.

Therefore, in accord with my client's instructions, I set forth the following as the final reason for granting this Petition:

> So much of the time we're just lost. We say "Please God, what is right, tell us what is true? There is no justice; the rich win and the poor are powerless. We become tired of hearing people lie; and after a time we become dead. We think of ourselves as victims and we become victims.
>
> We become weak, we doubt ourselves, we doubt our beliefs; we doubt our institutions and we doubt the law. But today you are the law; not some book, not the lawyers, not a marble statue or the trappings of the court. Those are just symbols of our desire to be just. They are in fact a prayer, a fervent kind of frightened prayer.
>
> In my religion they say "Act as if ye had faith: faith will be given to you." If we are to have faith in justice, we need only believe in ourselves and act with justice. I believe there is justice in our hearts.

CONCLUSION

I believe there is justice in the United State Constitution for each and every citizen, no matter their race, religion, sex, economic station or whatever, if there is due process of law and equal protection of the laws. Therefore, I pray this Honorable Court grant a Writ of Certiorari in this matter.

Respectfully submitted,

Dean Lynch, Attorney
for Petitioner

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STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court,
held at Court of Appeals Hall
in the City of Albany on the
twenty-second day of September
1994

PRESENT, Hon. Judith S. Kaye, Chief Judge, presiding.

1-10 Mo. No. 824
Matter of Citibank, N.A. and
Michael J. Kiely, Jr., as
Executors of the Estate of
Janet C. Hauck, deceased,
Respondents,

v.

Janet Hauck Ward,
Appellant.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

s/
Donald M. Sheraw
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK -
APPELATE DIVISION , FIRST DEPARTMENT ENTER: 3-17-94

Present-Hon. Joseph P. Sullivan Justice Presiding
John Carro
Richard W. Wallach
Sidney H. Asch Justices.

Application of Citibank, n.a. and
MICHAEL J. KIELY, JR. as Executors
of the Estate of
JANET C. HAUCK
Deaceased M-680
To Discover Personal Property M-681
Withheld and Belonging to Decedent

Proceedings by JANET HAUCK WARD
to Compel Delivery to Her of
Specific Personal Property
Claimed to be Withheld by the
Executors of the Estate of
JANET C. HAUCK, Deceased

Petitioner-appellant, Janet Hauck Ward, having moved to reargue two decisions and orders of this Court entered January 11, 1994 (Appeal Nos. 50507-50508), or, in the alternative, for leave to appeal to the Court of Appeals,

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon,

It is ordered that the motions be and same hereby are denied in their entirety with $100 costs each.

ENTER:

---

s/ Catherine O'Hagan Wolfe
Clerk

SUPREME COURT OF THE STATE OF NEW YORK
APPELATE DIVISION FIRST DEPARTMENT

Sullivan, J.P., Carro, Wallach, Asch, JJ.

DECIDED 1-11-94
Index No. 50507

Application of CitiBank, N.A., and Michael J. Kiely, Jr., as Executors of the Estate of

JANET C. HAUCK, Deceased.

To Discover Personal Property Withheld and Belonging to Decedent.

Decree, Surrogate's Court, New York County (Eve Preminger, S.), entered on or about February 8, 1993, which ordered, adjudged and decreed that a certain 1950 Jackson Pollack painting is the property of the estate of decedent Janet C. Hauck, unanimously affirmed, without costs.

This appeal and a companion appeal (Matter of Hauck [Janet Hauck Ward], ___ AD2d ___, Appeal No. ?) decided herewith, concern two paintings by the artist Jackson Pollock. At issue here is the 1950 painting, bequeathed to respondent museum.

Since the parties stipulated that the issue would be decided on the basis of certain deposition transcripts and other documents, they cannot now be heard to complain that the Court improperly received evidence covered in that stipulation. Further, the evidence presented at the hearing held with respect to this painting did not satisfy the putative donee's burden of persuasion (Mortellaro v. Mortellaro, 91 AD2d 862, 863) to present clear and convincing proof (Matter of Lefft, 44 NY2d 915, 918) of unequivocal donative intent (see, e.g., Matter of Giacalone, 143 AD2d 749). The putative donee showed only an equivocal expression of intent (see, e.g., Matter of MacGregor 119 AD2d 909).

We have considered the appellant's remaining arguments, and find them to be without merit.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

ENTERED: January 11, 1994

s/Francis X. Galdo
Clerk

SUPREME COURT OF THE STATE OF NEW YORK
APPELATE DIVISION FIRST DEPARTMENT

Sullivan, J.P., Carro, Wallach, Asch, JJ.

DECIDED 1-11-94
Index No. 50508

Proceedings by Janet Hauck Ward to Compel Delivery to her of Specific Personal Property claimed to be Withheld by the Executors of the Estate of

JANET C. HAUCK, Deceased.

Order, Surrogate's Court, New York County (Eve Preminger, S.), entered on or about July 8, 1993, which, after hearing, dismissed the petition to compel delivery of a certain 1948 painting by Jackson Pollock in the possession of the Executors, unanimously affirmed, without costs.

For reasons similar to those stated in Matter of Hauck (Citibank N.A. and Kiely, [___ AD2d ___ , Appeal No. ?]) decided herewith, the evidence presented at the hearing concerning the 1948 painting does not satisfy the putative donee's burden of persuasion (Mortellaro v. Mortellaro, 91 AD2d, 862, 863), to present clear and convincing proof (Matter of Lefft, 44 NY2d 915, 918) of unequivocal donative intent (see, e.g., Matter of Giacalone, 143 AD2d 749). The testimony at the 1993 hearing was equally consistent with the wish that the Pollock painting be taken for safe-keeping (as was admittedly the case with the work of another artist, taken by the putative donee at the same time) as it was with a donative intent. It was also consistent with the claimant's status as a specific legatee of the painting under decedent's will.

We have considered the appellant's remaining arguments, and find them to be without merit.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

ENTERED: January 11, 1994

s/Francis X. Galdo
Clerk.

SURROGATE'S COURT :
NEW YORK COUNTY — Oral Decision 6-23-93

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x — File No.3810/91

Proceedings by JANET HAUCK WARD
to Compel Delivery to Her of x
Specific Personal Property
Claimed to be Withheld by the x
Executors of the Estate of
JANET C. HAUCK,Deceased x

Judge Preminger: Petitioner has failed to meet her burden of proving that the conversation which is actually the only testimony here with respect to the transaction is susceptible or more susceptible of the interpretation that the delivery of the painting was intended as a gift as opposed as to a custody of the paintings for the relevant period.

SURROGATE'S COURT : NEW YORK COUNTY — Decision 7-8-93

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x — File No.3810/91

Proceedings by JANET HAUCK WARD
to Compel Delivery to Her of x
Specific Personal Property
Claimed to be Withheld by the x
Executors of the Estate of
JANET C. HAUCK,Deceased x

PREMINGER, S .

In this turnover proceeding, trial was held to determine title to a painting which petitioner, decedent's daughter, alleged was given to her. Petitioner failed to establish a necessary element of the gift, e.g., decedent's intent , by clear and convincing evidence (Gruen v Gruen, 68 NY2d 48; Matter of Szabo, 10 NY2d 94; see also, Matter of Hauck, NYLJ, Dec. 23, 1992, at 23, col 2) and at the conclusion of her case respondents' motion to

dismiss was granted.
Order signed.

s/Eve Preminger
..... July 8, 1993 SURROGATE

Surrogate's Court: New York County Filed 12-17-92

———————————————————X

Application of Citibank, N.A. and
Michael J. Kiely, Jr., as Executors of
the Estate of
JANET C. HAUCK, File No. 3810/91
Deceased,

To Discover Personal Property Withheld
and Belonging to Decedent

———————————————————X

Preminger, s

At issue in this discovery proceeding is the ownership of a painting by Jackson Pollock described in decedent's will as "oil on canvas board - 1950 - 22 inches by 22 inches".

Decedent bequeathed the painting, along with several other works of art, to The Solomon R. Guggenheim Museum (the "museum"). After the executors offered decedent's will for probate they learned that her daughter had possession of the painting. They then commenced this proceeding for discovery and turnover of the painting (SCPA 2103, 2104) to which respondent answered alleging that it was given to her as a gift.

The parties agreed to submit the matter without a hearing. Adopting this procedure has resulted in a preliminary issue concerning the admissibility of respondent's testimony.

Before commencing the examination of various witnesses counsel for the executors and respondent stipulated that the matter would be submitted on papers and that the impending despositions would be treated as testimony before the court. Respondent was then called as the executors' first wit-

ness at which time she testified to the circumstances leading up to the alleged gift. An examination of the attorney draftsman and a friend of the respondent followed. Although the museum was not a party to the original stipulation, it later agreed to waive a trial but reserved the right to object to respondent's testimony. The museum and the executors now ask the court to disreagrd respondent's testimony because it is in violation of the Dead Person's Statute (CPLR 4519).

Parties to a lawsuit are free to chart their own course and may fashion a basis upon which a particular controversy will be resolved (see, Cullen v Naples, 31 NY2d 818; Stevenson v News Syndicate Co., 302 NY 81; Matter of Malloy, 278 NY 429)., Here, the parties have charted their course and the record, as agreed to, constitutes a "trial" of the matter. In that regard, because respondent was called as a witness by the executor, an adverse party, the Dead Person's Statute has no application. The law is well settled that an "otherwise interested" witness is no longer interested if called by an adverse party (Matter of Anna, 248 NY 421; Brezinski v Brezinski, 84 AD2d 464; Matter of Anooshian, 13 AD2d 626; Matter of Berardini, 238 App Div 433, affd 263 NY 627, Matter of Radley, 228 App Div 119). Accordingly, respondent is a competent witness and the court has considered her testimony in rendering this decision.

The basic facts are as follows:

Decedent's husband, who predeceased her, was an artist and teacher of abstract expressionism. His work brought the Haucks in contact with several noted artists of that genre. During their marriage they acquired works by many of those artists, including two paintings given to them by Jackson Pollock.

The Haucks also became involved with the museum and members of the Guggenheim family. Fred Hauck was on its Board of Trustees for many years together with Harry Guggenheim (a nephew of the museum founder) and his wife Alicia. Through this association, decedent and Alicia Gugenheim became close friends. Mrs. Guggenheim was made respondent's godmother. When she died, Mrs. Guggenheim provided for decedent and then respondent with a lifetime annuity.

On March 23, 1979 decedent executed her will under which she left the museum "in loving memory of Alicia Patterson Guggenheim and Fred Hauck" thirteen paintings, including the disputed Pollock and several

works by her husband. Respondent is the beneficiary of decedent's other painting by Pollock and three paintings by a different artist. Decedent then made several other preresiduary bequests and disposed of the balance in trust for the benefit of her daughter.

After the will was executed, decedent asked the draftsman, who is one of the executors, to notify the museum of its prospective bequest. An official of the museum responded to his letter by requesting an itemization of the paintings, which was provided. The draftsman testified that decedent never informed him of any change in the bequest to the museum.

Respondent states that her mother gave her both Pollocks in the early 1980s. The gift was expressed during conversations between them when decedent told respondent to take the paintings home. Respondent asserts that she did not take possession of the paintings because she wanted her mother to continue to enjoy them. Supporting evidence of decedent's intent to make a gift in the early 1980s is offered by the president of Salander-O'Reilly Galleries, Inc., who had appraised decedent's art work. He states that on several occasions he expressed a desire to purchase the Pollock Paintings and Decedent would answer "more or less that she had no interest in a sale and anyway (he) would have to talk to her daughter after she died . . ." Concedely, up until June, 1991 the disputed Painting was always in decedent's possession.

In the spring of 1991, decedent removed the paintings from her apartment to her home in East Hampton. In late May or early June, 1991, decedent called respondent and insisted that she "physically take (the paintings)" to her home. respondent states that "(this) was very important to her. And she said that she hoped that I would enjoy them as much as she and my father had". Respondent then went to decedent's home accompained by a friend. While there respondent's friend saw decedent hand the paintings to respondent. He did not hear their conversation. Shortly thereafter, decedent was hospitalized. While decedent was in the hospital she asked respondent to remove from the East Hampton house a painting by Franz Kline, also bequeathed to the museum, because she was concerned about it remaining in an empty house. Decedent never returned home from the hospital where she died on June 27, 1991.

On September 16, 1991, respondent brought both Pollock paintings and the Franz Kline to the Salander-O'Reilly Galleries, Inc. Respondant states that she left the three paintings with the gallery for safekeeping.

This proceeding followed.

The three elements of a gift are intent on the part of the doner to make a present transfer, delivery and acceptance (Gruen v Gruen), 68 NY2d 48; Matter of Szabo, 10 NY2d 94). It is the party alleging the gift who has the burden of proving it by clear and convincing evidence (Gruen v Gruen), supra, at 53; Matter of Abramowitz, 38 AD2d 387, affd 32 NY2d 654, Matter of Kaminsky, 17 AD2d 690, app dsmd 12 NY2d 840). This burden has been described to mean direct proof of each element of the gift (Matter of Kaminsky, supra, Matter of Hicks, 82 Misc 2d 326).

Decedent's intent is the missing element in this case. Delivery appears to be established from the testimony of respondent's friend who saw decedent physically transfer the paintings. However, delivery, standing alone, is insufficient to establish a gift (Matter of Hicks, supra; Matter of Nash, NYLJ, April 2, 1979, at 15, col 4).

Respondent's testimony is the only evidence offered to establish intent. Where the proof is offered by an interested witness, our courts will evaluate the evidence to determine whether it suggests any other design or purpose, such as a transfer for purpose of custody, on the part of the doner. If the court can find a different result from that proposed by the interested witness then the proof is not clear and convin- cing (See, Matter of Mcffett, 49 Misc 2d 225; Matter of Harter, 43 Misc 2d 1027, affd 24 AD2d 681; Matter of Burack, NYLJ, May 5, 1987, at 15, col 6; Matter of Lamonaca, NYLJ, May 16, 1983, at 18, col 4; Matter of Fiorino, NYLJ, August 23, 1982, at 12, col 4).

This rule has partucular applicability here where it has been shown that the bequests to the museum were of a personal nature. It is unlikely that decedent would make such a significant change in her will without notifying her attorney or the museum. Respondent fails to offer any explanation for decedent's change of mind. Instead, she relies on her close relationship with decedent and maintains that the gifts were given for sentimental reasons. While a close familial relationship may be of some probative value in establinging intent, it is not in and of itself sufficient to prove intent (see, Matter of Szabo, Supra; Matter of Bedenkapp, NYLJ, September 17, 1985, at 13, col 4). Moreover, under these circumstances, the existence of the relationship does not overcome a finding of an inconsistent result.

Here, the proof compels a finding that decedent transferred the paintings for safekeeping. Decedent was about to be hospitalized for a serious illness and may have been concerned with the Pollock paintings remaining in an empty house. She specifically asked respondent to remove the Franz Kline painting for that reason. Even respondent does not claim that the Kline painting was a gift. In view of this apparent inconsistency, respondent has failed to establish the gift by clear and convincing evidence.

Accordingly, respondent is directed to return the painting to the executors within thirty days from entry of a decree to be settled herein.

Dated: December 17, 1992

s/ Eve Preminger
SURROGATE

COURT OF APPEALS
OF THE STATE OF NEW YORK

Application of Citibank, n.a. and
MICHAEL J. KIELY, JR. as Executors
of the Estate of

JANET C. HAUCK

deceased

NOTICE OF MOTION
FOR LEAVE TO
APPEAL

To Discover Personal Property
Withheld and Belonging to Decedent

Proceedings by JANET HAUCK WARD
to Compel Delivery to Her of
Specific Personal Property
Claimed to be Withheld by the
Executors of the Estate of
JANET C. HAUCK, Deceased

Date: June 17, 1994

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Ridgewood, NJ 07450
(201) 447-1886

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Attorneys for the Solomon R. Guggenheim Foundation
1155 Avenue of the Americas
New York, New York 10036

COURT OF APPEALS
OF THE STATE OF NEW YORK

Application of Citibank, n.a. and
MICHAEL J. KIELY, JR. as Executors
of the Estate of

JANET C. HAUCK

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SIRS:

PLEASE TAKE NOTICE THAT PURSUANT TO Sec. 500.11 and CPLR 5602, Janet Hauck Ward, Appellant, upon the annexed brief of Dean Lynch, Esq. Attorney for Appellant, and upon all proceedings heretofore and herein will move before this Court at a stated term thereof, to be held at the Court House of the Court of Appeals in the City of Albany, State of New York, on the 27th day of June, 1994, at the opening of Court on that day, or as soon thereafter as counsel can be heard, for an order as follows:

(a) Allowing appeal to be taken by Janet Hauck Ward, Respondent-Appellant as to the Decree of the Surrogate Eve Preminger entered January 12, 1993 and the unanimous affirmance by the Appellate Division, First Department decision No. 50507 entered 1/11/94 attached hereto [19] in the first above captioned matter; and, (Hereafter-CITIBANK)

(b) Allowing appeal to be taken by Janet Hauck Ward, Petitioner-Appellant as to the Order of Surrogate Eve Preminger entered July 8, 1993 and the unanimous affirmance by the Appellate Division, First Department decision No. 50508 entered 1/11/94 attached hereto [28]in the second above captioned matter; and, (Hereafter-JANET HAUCK WARD)

(c) and for such other further relief as this court may deem just, proper and equitable.

QUESTIONS PRESENTED

The questions presented for review are:

1. Does the Appellate Court's consolidation of two separate appeals without motion in violation of CPLR 602, and/or notice to the parties violate due process?

2. May the Appellate Court, without motion and/or notice to the parties consolidate two separate appeals, in order to utilize evidence from one to decide the other?

3. If the Appellate Court has not consolidated two matters, is it a violation of due process to decide an appeal upon facts not in evidence in the case appealed?

4. May the Appellate Court change findings of fact by the trial court, which have not been raised as issues on Appeal?

5. May a trial court entertain facts and/or circumstances outside of the evidence presented to support conjecture as the basis of its decision?

6. May a trial court utilize speculation contrary to the evidence presented to determine a failure to carry the burden of clear and convincing?

7. If the function of the trial court is to evaluate the evidence, may it fabricate evidence?

8. When a trial court engages in conjecture outside of the evidence presented, has it become an advocate and not a judge?

9. Is the burden of clear and convincing as to an inter vivos gift between a parent and child a misapplication of equities?

PROCEDURAL HISTORY

The statement of procedural history is as follows:

(Note:[_] refer to Attachment page # herein and ( ) refer to Record on Appeal-JANET HAUCK WARD)

On April 2, 1992, Executors commenced a proceeding (CITIBANK) for discovery and turnover of the Jackson Pollock-1950 painting (SCPA 2103, 2104) in the possession of Appellant on the date of death of decedent and which by the 1979 Will was left to the Guggenheim Museum. [41] Appellant answered alleging that the Pollock-1950 painting in question therein as well as the Pollock-1948 devised under the Will were given to her as a gift.

The parties through counsel entered into a stipulation setting forth the evidence, with reserve as to issues of relevance, materiality and competence, and submitted in lieu of trial.

The matter was then presented to Surrogate Eve Preminger for her consideration.

On December 17, 1992 the Surrogate published her Decision. [41-47] Matter of Hauck, NYLJ, Dec. 23, 1992,@ 23,col 2.

On January 11, 1993, Executor's counsel advised of the intent to sell the Jackson Pollock-1948 to satisfy taxes at the May Christie's sale. (123)

On January 12, 1993, the Decree as to said Decision was entered, [48-49] and the Executors entered into a contract with Christie's to sell the 1948 painting. (37-38)

On January 13, 1993, the January 11, 1993 letter was received by Appellant's counsel. (123)

On February 8, 1993 the Notice of Appeal was filed.(86-89) The Pre-Argument Statement therein Set forth, at items #6,7 & 8, the mistaken position that both Jackson Pollock paintings were tied to the Decision. (89)

No Cross-Appeal was filed.

On April 15, 1993, Appellant's counsel attempted to stay the sale at Christie's scheduled for May 4, 1993, by appearing at the Appellate Division-First Department. (62-102) At that time Executor's counsel pointed up to the Law Assistant that the Decree did not involve the 1948 Pollock, but only the 1950 Pollock. In light of same the Appellate Court having no jurisdiction, the matter was not entertained.

On April 19, 1993, in accord with the suggestion of the Appellate Court, Appellant's counsel requested that the Executors consent to the resettling of the Decree. (107-117) Counsel for the Executors replied in the negative. (118-119)

On April 21, 1993, the Petition of Appellant (Second action-JANET HAUCK WARD) was filed together with a request for an Order to Show

Cause. The Petition requested that the Executors turnover the 1950 Pollock that had been obtained by false pretenses. (13-17) The matter was presented to Surrogate Renee R. Roth, who issued an Order to Show Cause returnable April 27, 1993. (11-12)

On April 27, 1993, at the return, Surrogate Preminger presiding, Appellant's counsel expressed his surprise, and pointed up that the earlier matter was on Appeal. After assurances by Surrogate Preminger that the earlier case would not prejudice the present matter, [41-47] and pointing up the reasoning of the earlier Decision appeared to favor the gift of the 1948 Pollock,[46] no request was made for Surrogate Preminger to step aside. Also, on that date the Executors filed an Answer (18-23) and a Motion to Dismiss the Petition (24-57). Appellant, on that same date filed an Affidavit in Support of Petition. (58-128)

On April 29, 1993, the Surrogate denied the Motion to Dismiss and ordered a hearing on the matter. (133-134)

(NOTE: On May 4, 1993, by personally appearing the Counsel for Appellant obtained a copy of the Decision and fowarded same to Christie's and Executors' counsel in an attempt stop the sale. The sale continued with a caveat as to the future determination of title. The Decision appeared in the Law Journal on May 5, 1993.)

On May 24, 1993, the Order was entered setting the hearing for June 24, 1993.

On June 18, 1993, the parties were orally advised that the hearing was to be moved up to June 23, 1993.

On June 23, 1993, the matter was heard, and the Motion to Dismiss granted. (148-201)

On July 1, 1993, Notice of Appeal was filed. (5-7)

On July 8, 1993, the Order appealed from [57-58] and the opinion therefore [56] were entered.

On July 29, 1993, the Appellant Division-First Department ordered that the Emergency Stay granted by the Honorable Francis T. Murphy be extended pending appeal on condition that the Appeal herein be perfected on or before September 7, 1993.

No Cross-Appeal was filed.

On Septmber 7, 1993 separate briefs were filed and filing fees paid on each matter perfecting both Appeals.

On November 19, 1993, each Appeal was argued separately.

On January 11, 1994, the unanimous Decisions of the Appellate Division First Department affirmed the Decree of January 12, 1993 (No.50507-CITIBANK) and the Order of July 8, 1993 (No.50508-JANET HAUCK WARD), and noted in each opinion " This appeal and a companion appeal..."[19 & 28]

On February 7, 1994, as to each Decision a Notice of Motion, copies attached and incorporated herein [17-40], were filed for reargument and in the alternative leave to appeal. Said Notices of Motion set forth the issue of improper consolidation as a denial of due process [32-33], as well as reference to the other issues raised by the questions set forth above which were raised as to plain errors set forth in the Appellate Court's decisions.

On March 17, 1994, the Appellate Division First Department by a single order denied both motions. [63]

On June 17, 1994, Notice of Entry as to the Decisions [59 & 62] and Order [64] denying the Motions for reargument & leave to appeal were served on the parties by the attorney for the Appellant.

JURISDICTION

The Decisions and Order which are the subject of the within motion are final vesting jurisdiction in this Honorable Court.

ARGUMENT

Argument showing why the questions presented merit review by this Court is as follows:

1. Does the Appellate Court's consolidation of two separate appeals without motion in violation of CPLR 602, and/or notice to the parties violate due process?

2. May the Appellate Court, without motion and/or notice to the parties, consolidate two separate appeals in order to utilize evidence from one to decide the other?

3. If the Appellate Court has not consolidated two matters, is it a violation of due process to decide an appeal upon facts not in evidence in the case appealed?

The public importance of these questions are clearly at the heart of our

judical system. These questions are directed to the issue of the function of the Appellate Court and due process. It is without dispute that the two cases have common questions of law and fact, and if a motion had been made and/or notice given the Appellant would not have been prejudiced by a consolidation. The Appellate Court's consolidation without notice, which was only disclosed upon the rendering of each of the decisions, denied Appellant due process of law. The failure to properly address the evidence in each matter separately contributed to a miscarriage of justice in both matters. The Appellant attempted, in its motions for reargument, to point up this error, and the prejudice which resulted. [17-40] Had Appellant known of the Appellate Court's consolidation, she would have presented a different brief and oral argument [37-40] utilizing the benefit of Mr. Scott's complete testimony(167) in the second case (JANET HAUCK WARD) to expose the lie that poisoned the decision in the first case (CITIBANK).[32] The failure of the Appellate Court to limit its review of the trial court to the Record On Appeal of the case being reviewed is a fundamental denial of due process. If an Appellate Court is allowed to combine evidence from different appeals without notice it makes a mockery of the review process; simply put they are reviewing a different case than that tried below. (Note: Appellant's brief, CITIBANK pages 22-24, which demonstrate the Appellant's commitment to not comingle the facts.)

4. May the Appellate Court change findings of fact by the trial court which have not been raised as issues on Appeal?

The importance of this question is fundamental to the appellate process. The failure of this system is illustrated clearly in reviewing how the Appellate Court having improperly consolidated these matters not only took evidence from one case to rationalize its error, but compounded the miscarriage of justice by changing the undisputed evidence.

The Surrogate correctly determined in the first case, CITIBANK, that there were two transactions, one as to the Pollocks before decedent had knowledge she was entering the hospital which Appellant testified completed the gift, and one after decedent was in the hospital, the work of another artist which Appellant admits was for safekeeping.[44] The Appellant Court in its decision in the second case, JANET HAUCK

WARD, .although there was no evidence even mentioning this transaction in the second case, concludes: "The testimony at the 1993 hearing was equally consistent with a wish that the Pollock painting be taken for safe-keeping (as was admittedly the case with the work of another artist, taken by the putative donee at the same time) as it was with a donative intent."

This "new evidence" "may have been" the rational for the erroneous conclusion relating to these two transactions that the Surrogate used to justify her decision: "In view of this apparent inconsistency respondent has failed to establish the gift by clear and convincing evidence."[46-47] The Appellate Court resolves this "inconsistency" by changing the facts to rationalize a result which does not "reflect objectively the subjective mind" of decedent and her paramount intention that her daughter have the paintings, or reflect the finding of facts below.
(NOTE: See Appellate Brief-CITIBANK @ page 20 & 39)

5. May a trial court entertain facts and/or circumstances outside of the evidence presented to support conjecture as a basis of its decision?

6. May a trial court utilize speculation contrary to the evidence presented to determine a failure to carry the burden of clear and convincing?

7. If the function of the trial court is to evaluate the evidence, may it fabricate evidence?

8. When a trial court engages in conjecture outside of the evidence presented, has it become an advocate and not a judge?

The first three questions above strike at the essence of the judicial process, and it is of the utmost public importance that the answer to each be a resounding NO! To answer otherwise is to render the evidence presented in a case irrelevent, and the function of the judge meaningless. To allow conjecture contrary to the direct evidence of a case in order to reach a desired conclusion makes justice in any matter illusory. The trial court in the first matter, CITIBANK, did just this.

With no evidence to support same the Surrogate states:

> " Decedent was about to be hospitalized for a serious illness and may have been concerned with the Pollock paintings remaining in an empty house." [46]

There was no evidence decedent was ill at the time she gave her daughter the Pollock paintings, nor was the house empty at that time.

(Note: See Appellant's Reply Brief-CITIBANK page 4 & 5)

Further, the trial court clearly engages in conjecture-"may have been"-as to uncontradicted evidence to fabricate an "inconsistency" that does not exist in the evidence. (Note: See Appellant's Brief-CITIBANK page 20)

Therefore, the answer to the fourth question above is yes; the trial court has crossed the line from a neutral party to a participant when advocating a point of view not supported by or even consistent with the evidence presented.

The evidence is consistent and supported only one conclusion, conjecture need not be consistent or supported. (Note: See Appellant's Brief CITIBANK page 17)

9. Is the burden of clear and convincing as to an inter vivos gift between a parent and child a misapplication of equities?

This question poses the novel proposition that the law, as presently constituted, fails its most important mandate-to dispense justice. The burden of clear and convincing appears to have evolved in cases where the facts gave raise to an initial doubt, which required the truth of the gift to be established in order to overcome the unnatural or illogical disposition of property. I have no problem with the law, I object to its application to defeat a gift which is by its very nature logical. (Note: See Appellant's Brief CITIBANK page 20)

The present status of the law is set forth in Matter of Hicks, 82 Misc. 2d 326: " The status and relationship of the parties can be indicative of donative intent." The application of this principle is well served in the context of most human relationships, but fails to engender the special and unique relationship of parent and child. The history and myth of law and its pursuit of justice going back to King Solomon has recognized the moral significance of the mother and child relationship. Therefore, this Court is requested to modify the principle set forth in Hicks to reflect the equities as follows: "Where the issues of delivery and acceptance have been resolved in favor of an inter vivos gift between a parent and child, that relationship shall be dispositive of donative intent in the absence of clear and convincing evidence to the contrary." Equity should demand that a child enjoy, by its birthright, this shifting of the burden of proof as to a parent's donative intent, to the party attacking the gift, particularly when

the two remaining elements of the gift have been satisfied having carried that same heavy burden of clear and convincing. To adopt this principle would recognize the parent and child relationship as an undeniable indicator of donative intent by setting it apart from all others, and eliminating conjecture as to the subjective mind of the parent. In this matter the uncontradicted evidence presented is the love of a parent for her only child. The Courts below have overlooked the evidence presented, and used conjecture to justify a result which is a cruel injustice and debases this truth. (Note: See Appellant's Brief CITIBANK page 39)

The principles and precedents of law, relied upon have been twisted in order to favor conjecture unsupported by facts, while ignoring the noble and relevent insight these same principles and precedents stand for.
Has the Law become blind to its purpose and definition?

No one has or could deny the intent of this mother to care for her beloved daughter in light of the evidence presented. This was never in issue and was admitted by the executors.(197) The fact that this mother, prior to her death, delivered the paintings in question and same were accepted by the daughter was never questioned and found to be true by the Surrogate.[45]

However, the intent was found to be the missing element of the gift. The same intent evidenced by the Will made 12 years prior which as its main thrust envisions a trust to care for the daughter in addition to her having one of the Pollock paintings[43]; the testimony of two art dealer friends 8 years prior that the daughter controlled the sale of the paintings[44]; testimony covering a period of 9 years of her mother's intent that the daughter have the paintings[42 & 44], including the insistence and constructive delivery by the mother 2 years prior to the undisputed physical delivery; the testimony of the daughter and her friend when physical delivery took place as to the conversation and the intent expressed therein "to enjoy them as much as she"[31-32] six weeks or more before the mother was unexpectedly taken to the hospital.[44] (Note: See Appellant's Brief CITIBANK page 32)

In addition, the undisputed evidence demonstrates no contradictory facts, and sets forth the change of circumstances, ZERO residuary estate to fund trusts for her daughter and granddaughter envisioned in 1979.(178) The Surrogate, however, found that the burden of clear and convincing was not carried. The Surrogate came to that conclusion without supporting

evidence using conjecture that: the mother knew she was terminally ill at the time of physical delivery[46]; after 40 years the Pollock paintings were no longer safe in her N.Y.C. apartment(167); the admitted intent as to another painting by another artist somehow reverted back to the physical delivery of the Pollocks six weeks earlier[46]; as well as any number of other wild conjectures unexpressed in the decision to justify the "apparent inconsistency" of a mother gifting her most prized worldly possessions to her only child. (Note: See Appellant's Reply Brief CITIBANK page 10)

In addition, in order to reach such a conclusion the findings of law and fact, as well as the controlling cases cited earlier in the same decision are totally disregarded. See Hicks,& Gruen The totality of the relevent evidence reflecting the mind of this mother demonstrates the transaction is an inter vivos gift to her only daughter, and it is nothing more than conjecture to find otherwise. This injustice denies the truth and is predicated on a clear disregard of the evidence, and a convincing misapplication of the law.

The grounds upon which leave to appeal is requested are set forth above and in detail in the Appellant's briefs filed below, which are being filed herewith together briefs of the parties listed below and the Record On Appeal in each of the matters as required by sec. 500.11 which are made a part hereof.

It is respectfully requested that this Honorable Court read and consider the Memorandums and Affidavit submitted to the Appellate Division as to of the Motion for Reargument/Leave to Appeal which set forth additional arguments and facts in support of the plea for this Court's intervention.

Respectfully submitted,

_____

Dean Lynch, Esq.
Attorney for Appellant
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(201) 447-1886

Date: June 17, 1994

To: WORMSER, KIELY, GALEF & JACOBS, ESQS.
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WHITE & CASE,ESQS. (212) 819-8200
Attorneys for the Solomon R. Guggenheim Foundation
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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION,FIRST DEPARTMENT

	x	Civil Appeal
Application of CITIBANK, N.A. and MICHAEL J. KIELY, JR., as Executors of the Estate of	x	NOTICE OF MOTION
JANET C. HAUCK deceased	x	Index No. 50507
To Discover Personal Property Withheld and Belonging to Decedent	x	

PLEASE TAKE NOTICE THAT PURSUANT TO Sec. 600.14 and CPLR 5513, Janet Hauck Ward, Appellant, upon the annexed Memorandum of Dean Lynch, Esq. Attorney for Appellant, and upon all proceedings heretofore and herein will move before this court at a Motion Term thereof, to be held at the Supreme Court Appellate Division First Department, 27 Madison Avenue, New York City, State of New York, on the l6th day of February, l994, at 10 o'clock in the aforenoon thereof, for an order as follows:

(a) Granting Rearguement as to the decision No. 50507 rendered l/ll/94 attached hereto in light of the overlooked and misapprehended Law and fact; or,

(b) In the alternative granting permission to appeal to the Court of Appeals, and,

(c) and for such other further relief as this court may deem just, proper and equitable.

Respectfully submitted,

Dean Lynch, Esq.
Attorney for Appellant
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Date: Feb. 7, 1994

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SUPREME E COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FIRST DEPARTMENT

Civil Appeal

Application of CITIBANK, N.A. and
MICHAEL J. KIELY, JR., as Executors
of the Estate of
JANET C. HAUCK
deceased
To Discover Personal Property
Withheld and Belonging to Decedent

Index No. 50507

MEMORANDUM

With all due respect this Honorable Court has overlooked and misapprehended the facts of the Appeal. A reading of the Decision in Citibank

states "the evidence presented at the hearing with respect to this painting did not satisfy the putative donee's burden of persuasion..." THERE WAS NO HEARING IN THIS MATTER! "Since the parties stipulated that the issue would be decided on the basis of certain deposition transcripts and other documents,...." The transcripts and other documents submitted contain clear and convining proof of unequivocal donative intent and same was never refuted or contradicted. The Court in citing Lefft, Mortellaro, Giacalone, and MacGregor has forgotten that the only issue before this Court was intent; delivery and acceptence having been decided in Appellant's favor by the Surrogate below. There was no cross appeal filed or pending.

> "The three elements of a gift are intent on the part of the donor to make a present transfer, delivery and acceptance (Gruen v Gruen 68 NY2d 48; Matter of Szabo, l0 NY2d 94). It is the party alleging the gift who has the burden of proving it by clear and convincing evidence (Gruen v. Gruen, supra, at 53; Matter of Abramowitz, 38 AD2d 387, affd 32 NY2d 654; Matter of Kiminsky l7 AD2d 690, app dsmd l2 NY2d 840). This burden has been described to mean direct proof of each element of the gift (Matter of Kaminsky, supra, Matter of Hicks, 82 Misc 2d 326). Decedent's intent is the missing element in this case. (15)

This Honorable Court has failed to address the proper application of Gruen, Hicks etc. which were raised in the Court below and are controlling on the issue of donative intent, and have relied on Lefft which turns on delivery:

> "... Geraldine Lefft's testimony accepted, appellants would have nonetheless failed to establisd a gift because of the absence of proof of delivery"

However, is the Court in Lefft stating that the most important evidence of intent is delivery? This same proposition appears to be the keynote of Mortellaro, Giacalone and MacGregor as well. No one disputes that Mrs. Hauck brought the two Pollacks to East Hampton and delivered same to her daughter. The question is why. This Court and the Surrogate say for "safekeeping" yet there is absolutely NO EVIDENCE to support this, and the only evidence and/ or mention of safekeeping comes from the testimo-

ny of Appellant as to an event weeks to a month or more later when her mother is in the hospital and asks her daughter to pick up a third painting for "safekeeping".(14) (Note in "companion case"(50508) this Court states "as was admittedly the case with the work of another artist, taken by the putative donee at the same time.) There is more than misapprehension, there is a total disregard for the record. At no time has any party questioned the basic facts including the Surrogate below.(14) There were two transactions, one as to the Pollocks and one as to the Kline, at two separate and distinct times. However all fail to recognize the two clear intentions.

> "In the spring of 1991, decdent removed the paintings from her apartment to her home in East Hampton. In late May or early June, 1991, decedent called respondent and insisted that she "Physically take (the paintings)" to her home. Respondent states that "(t)his was very important to her. And she said that she hoped that I would enjoy them as much as she and my father had". Respondent then went to decedent's home accompained by a friend. While there, respondent's friend saw decedent hand the paintings to respondent. He did not hear their conversation. Shortly thereafter, decedent was hospitalized. While decedent was in the hospital she asked respondent to remove from the East Hampton house a painting by Franz Kline, also bequeathed to the museum, because she was concerned about it remaining in any empty house. Decedent never returned home from the hospital where she died on June 27, 1991.(14 & 15)

It appears the trap is that if one is admitted to be for safekeeping,(16 & 17) all were for safekeeping, yet there is NO EVIDENCE to support this. The burden of persuasion could never be carried when this Court as well as the Surrogate has overlooked the facts in evidence. It is true the "evidence in these cases must be more carefully and critically scrutinized"(Mortellaro), and with all due respect that has not been the case in this matter. It is abundantly clear from the 1-11-94 Decision of this Honorable Court, just as in the Surrogate's below, confusion of the facts with irrelevent and

immaterial issues have carried the day. There is no reason to believe either Court ever reaches the threshold question of intent of Mrs. Hauck in light of the admitted and uncontradicted testimony in evidence of her daughter. What is equivocal in the evidence?

> "enjoy them as much as she and my father had." (14 & 58)

> "My mother had expressly stated to me that it was her desire for me to have and to own both of the aforesaid Jackson Pollock paintings." (25)

Further, in view of Gruen and actual physical delivery prior to death (14) in the context of the evidence concerning a life estate (25 & 58) the evidence of Mr. Salander is clarified.

> Yes, on several occasions between 1983 or 1984 and 1990...I approached Mrs. Hauck .inquiring whether or not she had any intention of selling the above mentioned painting. As I recall, her answer was more or less that she had no interest in a sale and anyway I would have to talk to her daughter after she died, which I took to mean that it was or would be her painting and therefore ultimately her decision.
>
> (31 & 32)

This "Supporting evidence of decedent's intent to make a gift in the early 1980s.."(14) is clear and convincing evidence of the "subjective mind" and "donor's intention", see Hicks, which has been overlooked by this Court, just as it was by the Surrogate below. "Respondent's testimony is the only evidence offered to establish intent."(15) Were not the "transcripts and other documents," "recieved evidence"? (18-361)

The question for the Court of Appeals, in addition to those raised in the Appellant's brief, is:

> **What is inconsistent in a mother gifting two paintings, she has expressed an intent to do so consistently for over seven years, to her only daughter, and then weeks later while in the hospital asking the daughter to keep safe a third painting?**

Where in the evidence is the fact Mrs. Hauck was "concerned with the Pollacks paintings remaining in an empty house"? (16)

Respectfully submitted,

s/_____
Dean Lynch

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION,FIRST DEPARTMENT

_ _____	x	Civil Appeal
Proceedings by JANET HAUCK WARD to Compel Delivery to Her of Specific Personal Property	x	NOTICE OF MOTION
Claimed to be Withheld by the Executors of the Estate of	x	Index No. 50508
JANET C. HAUCK,Deceased	x	

PLEASE TAKE NOTICE THAT PURSUANT TO Sec. 600.14 and CPLR 5513, Janet Hauck Ward, Appellant, upon the annexed Memorandum of Dean Lynch, Esq. Attorney for Appellant, and upon all proceedings heretofore and herein will move before this court at a Motion Term thereof, to be held at the Supreme Court Appellate Division First Department, 27 Madison Avenue, New York City, State of New York, on the 16th day of February, 1994, at 10 o'clock in the aforenoon thereof, for an order as follows:

(a) Granting Rearguement as to the decision No. 50508 rendered 1/11/94 attached hereto in light of the overlooked and misapprehended Law and fact; or,

(b) In the alternative granting permission to appeal to the Court of Appeals, and,

(c) and for such other further relief as this court may deem just, proper and equitable.

Respectfully submitted,

Dean Lynch, Esq.
Attorney for Appellant
579 Franklin Tpke.
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Date: Feb. 7, 1994

To: WORMSER, KIELY, GALEF & JACOBS, ESQS.
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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FIRST DEPARTMENT

x Civil Appeal

Proceedings by JANET HAUCK WARD
to Compel Delivery to Her of
Specific Personal Property x
Claimed to be Withheld by the
Executors of the Estate of
JANET C. HAUCK, Deceased x

MEMORANDUM

Index No. 50508

MEMORANDUM

With all due respect the 1-11 Decision demonstrates the Court's confusion as to the facts, particularly as to the undisputed time line of events.

March 23, 1979-Will (INTENT)

February, 1983-O'Rielly Testimony (CHANGE IN INTENT)

Summer, 1989-Daughter Testimony Life Estate
(INTENT & CONSTRUCTIVE DELIVERY)

April, 1991-Mrs. Hauck removes Pollocks from Manhattan apartment to East Hampton (INTENT)

May, 1991- Mrs. Hauck "insists" Daughter take and "enjoy" Pollacks in presence of witness, Paul Scott
(INTENT, DELIVERY & ACCEPTANCE)

June 16, 1991-Mrs. Hauck admitted to hospital

June 20, 1991-Mrs. Hauck requests Daughter pick up Kline Painting for "safekeeping"

June 27, 1991-Mrs. Hauck died

The Decision states:

"...equally consistent with a wish that the Pollack painting be taken for safe-keeping (as was admittedly the case with the work of another artist, taken by the putative donee at the same time) as it was with a donative intent."

From this it is clear that the facts have been misapprehended by the Court, and the time line overlooked.

Further, the Court has in the face of settled law, Hicks, Gruen, Corn and others stated that the relationship of a daughter and mother(165 & 171); the change of econmic cicumstances resulting in a ZERO" residuary estate; the constructive delivery prior to the physical delivery supported by testimony of a life estate in Mrs. Hauck(159,& 166 thru 168); and the uncontradicted testimony of two uninterested witnesses (158 thru 164 & 164 thru 190) are all arguments without merit.

These oversights are particularly distressing in light of the well settled law which states:

> The status and relationship of the parties can be indicative of donative intent.

Matter of Hicks, 368 N.Y.2d 675

The question is properly resolved by a consideration of the totality of relevent evidence on those considerations which reflect objectively the subjective mind.

Matter of Hicks, 368 N.Y.2d 675

The correct test is "'whether the maker intended the [gift] to have no effect until after makes death, or whether he intended it to transfer some present interest'"

Gruen v. Gruen, 68 N.Y.2d 48

Uncontradicted testimony of respondent's witness and respondent's husband need not be corroborated.

In re Corn's Estate, 114 N.Y.S.2d 14

It appeared this Court at oral argument recognized the testimony that Mrs. Hauck stated she wanted her daughter to "enjoy" the paintings, and as Justice Wallach observed it would have been helpful if she said "for how long". Clearly, the recognition of the intent to enjoy merits comment, if only to clarify how same is interpreted by the Court to engender "safe-keeping", when what Mrs. Hauck said was "enjoy them as much as she and my father had"(44) as owners.

In addition, a review of the hearing transcript reveals there is no mention in the testimony of the witnesses, nor comments of counsel of the "work of another artist",(148 thru 208) clearly the Surrogate below and the Court here have improperly made their decisions on facts not properly before them and the case at bar.

If the Court has consolidated the two matters as is evidenced by reading of each of the decisions (50507 and 50508) it has done so without notice to the parties and in doing so compounded the injustice to my client. If the records are combined the statement of the Surrogate that "While there respondent's friend saw decedent hand the paintings to respondent. He did not hear their conversation."(44); is known to be incorrect and

makes all of the findings of fact and applications of law erroneous.

Due process demands that the Courts sit as impartial and unprejudiced judges of the facts in the case. The using of information, evidence or otherwise from a separate and distinct matter is totally improper.

To dismiss as without merit the arguments of Appellant is to give no recognition to the principles of Hicks, Gruen and the other cases cited demonstrates this Court's failure to understand the facts of this case. However, the Court having misunderstood the facts, and/or considered facts improperly before it, has no choice but to error.

If it is the Court's position that the matters are or should be consolidated, the parties are entitled to know this. Just as the Surrogate below improperly used knowledge of the other case in reaching its conclusion to dismiss the petition as to the 1948 Pollock, this Court has stated in its decision that the key reason for affirming the Court below is a fact not in evidence. Further, the Courts failure to address the "putative donee" as the daughter of the deceased highlights the failure of the Court to take cognizance of Hicks.

> It is thus readily understood that it is the donor's intention that is paramount in determing whether a transaction is an inter vivos gift. McCarthy v. Pieret, 281 N.Y. 407, 409. The rule is easy expression, but difficult in application. Generally no one factor or consideration is independently determinative of the issue. The question is properly resolved by consideration of the totality of relevent evidence on those considerations which reflect objectively the subjective mind.

Simple justice demands a reargument of this matter, in which the Court is consistent with its function to be fair and impartial.

The questions of law to be reviewed by the Court of Appeals, in addition to those raised in Appellant's brief is:

> How can a Court make a determination which turns on facts not before it?

Does due process allow the Court to consolidate two separate matters

without notice to the parties?

Respectfully submitted,

s/_____
Dean Lynch, Esq.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION,FIRST DEPARTMENT

	x	Index No.50508
Proceedings by JANET HAUCK WARD		
to Compel Delivery to Her of	x	Affidavit
Specific Personal Property		
Claimed to be Withheld by the	x	
Executors of the Estate of		
JANET C. HAUCK,Deceased	x	

STATE OF NEW JERSEY)
) S.S.
COUNTY OF BERGEN)

I, DEAN LYNCH,ESQ.,being duly sworn,deposes and says:

1. I am the attorney for the Petitioner-Appellant,JANET HAUCK WARD,in the above captioned matter,as well as the separate and distinct matter entitled "Application of CITIBANK,N.A. and MICHAEL J. KIELY,JR,. as Exectors of the Estate of JANET C. HAUCK,deceased,To Discover Personal Property Withheld and belonging to Decedent" which was also on appeal to this Court, Index No. 50507.

2. Both matters were heard before this Court on 11-19-93, each under a separate calander number. The Decisions were rendered on 1-11-94, and

reported in the Law Journal on 1-13-94. At all time these matters have been separate and distinct actions. A reading of the Decisions clearly indicate that the Court has considered the cases as companions, with no notice to the parties, and taken evidence not properly before it in this matter from the other. This being the case, has judical error, violating due process, been committed by allowing the same panel to sit on both matters?

3. The evidence concerning "the work of another artist" not only is incorrect factually, but was never even mentioned at the hearing of 6-25-93. (148-208) Therefore, the Court, just as the Surrogate below, by using the issue of "safe-keeping" as to the Kline, improperly considered facts, and engaged in peculation not supported by the record The failure of the Court to advise of its consolidation of the matters has contributed to the misapprehension of the facts and resulted in grave error. Had the parties been advised of this position of the Court a totally different brief would have been filed, and oral argument would have been quite different. (attached hereto and made a part hereof is the text of the oral argument had notice been given of consolidation of the two matters)

5. The same prejudice complained of below has reoccurred. The Court has overlooked and misapprehended the clear and convincing intent of Mrs. Hauck to gift in her lifetime the Jackson Pollock herein to her daughter. Clearly, it is admitted by the Executors: "Moreover, there isn't any doubt that she (Mrs. Hauck) intented the daughter have the painting, It's in the Will. We don't dispute that."(197) It had always been the intent to give the painting to the daughter. Only the time of delivery changed, completing the gift weeks before she died; and that issue was not before this Court.

5. No one can satisfy the burden of persuasion if the Court finds without merit agruments based on the evidence in this case, and utilizes evidence from the other case. Not only has the Court improperly looked to a transaction not testified to, it has, in order to even speculate as to safe-keeping. assumed that Mrs. Hauck was/or knew she was ill when she make delivery. From the testimony we only know Mrs. Hauck went to the hospital and died.(170-171) If she had had an auto accident would the Court's Decision be different?

It is respectfully requested that the Court, grant reargument.

_s/_____
Dean Lynch

Sworn & Subscribed
this 7th day of
February, 1994

__s/_____
Mark R. Alleman
Notary Public of New Jersey
My Commission Expires 7-9-95

ARGUMENT

(If notice of consolidation given to parties)

I come before this honorable court with the Hope of Deliverence of a loving Daughter. The facts are not in dispute,only their motives and INTENT. The surrogate below has determined, and there is no cross appeal pending, the issues of delivery and acceptance have been met and further determined that Appellant was " a competent witness and the court has considered her testimony"(12). The missing element and only issue before this honorable court is donative intent. In support of donative intent is the totality of objective evidence which reflects upon the subjective mind of Mrs. Hauck.

The undisputed facts reveal that Mrs. Hauck wrote her will in 1979, in which 1 page expresses her desire to recognize her husband and her childhood friend Alicia by a bequest to the Guggenhiem, and the balance of 14 pages in great detail express her manifest INTENT to care for her Daughter and Granddaughter, and give them the fruits of her life.

It is also undisputed that this manifest Intent never waivered, and only the circumstances changed to carry out this INTENT. The facts clearly show that beginning in the early 1980s Mrs. Hauck in numerous conversations with her daughter expressed her Intent to gift the painting(s) in question to her daughter, and it was the Daughter's desire to " have her mother to continue to enjoy them" which postponed delivery, but this in no way relates to the decedent's donative intent. Moreover same rings true when the Surrogate find that in the spring of 1991 Mrs. Hauck brings the painting(s)

to East Hampton and "insisted " her daughter phycially take them. This honorable court must hear the echos of GRUEN and follow it's WISDOM Further, the surrogate below found that there was "Supporting evidence of decedent's intent" from a third party which verifies the 1980s conversations.

However the most important undisputed objective evidence of Mrs. Hauck's INTENT is seen by the clear fact that there were two separate and distinct transactions and intents as the the Pollocks and the Kline. The respondents somehow had convinced the Surrogate that Mrs. Hauck knew when she make physical delivery of the Pollocks that a month or so later she would be hospitalized, but if that were the case why two transactions.

This fabrication by the Guggenheim flys in the face of the facts, not only from a logical point of view but the practical sense, because it negates the need to bring the Pollock paintings to East Hampton and raises the question of why didn't Mrs. Hauck have her daughter pick up the Kline when she was at the house. Moreover, the totality of the evidence demonstrates that the Pollocks had a different personal significance to the Hauck family. This personal relationship is key to understand her Intention. Not only must we recognize the mother daughter relationship, but the close relationship of Fred & Janet Hauck and Jackson & Lee Pollock which gave meaning to the paintings far beyond paint and canvas. This honorable court must put forth the voice of Justice with wisdom and understanding and recognize The Intent of Mrs. Hauck to give her daughter the love and inspiration the Pollock paintings represented to her. It was her youth and her love of life that enriched her past and gave her life its meaning.

Therefore from the evidence in both cases we place in the scales of Justice the following evidence of intent on the side of appellant:

1. relationship of the parties-MOTHER & DAUGHTER/ a institution which has had no contact with decedent in 12years
2. Actions of Decedent in bring the paintings to East Hampton; the Will which envisioned a trust & support for her only daughter & grand daughter; two separate tranactions evidencing two intentions;

3. Testimony of Mr. Salander & Mr. O' Reilly that as early as 83 decedent's intent as to the painting & the Guggenheim had changed and only the duaghter had the ownership right to sell the paintings/and that would only be effective upon termination of decedent's life estate.
4. Testimony of Mr. Scott having been present and heard the conversation when the paintings were turned and hearing decedent's desire and intent that her daughter enjoy them as much as decedent and her husband.
5. The fact of possession and all that implies under the totality of the circumstances.
6. The Wisdom of GRUEN & HICKS
7. The testimony of appellant which confirms all of the above and demonstrates a love of a daughter for her mother which put decedent's happiness above worldly possession.

To outweigh this the respondents have convinced the Court below with misstatement of fact, irrelevent and immaterial information resulting in "may have been"& "apparent inconsistency" tip the scale of Justice against donative intent and the truth. There was absolutely no evidence presented to contradict any of the facts presented above, in fact the lack of evidence from the Guggenheim by testimony or document of a relationship after 1979 implies the every reason Mrs. Hauck "may have been" disenchanted with the museum's lack of respect for her late husband.